IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 444 OF 1999

Suppu @ Sippu (Chippu)
Kandaswamy Devendra
(at present confined to
Bombay Central Prison)
residing at D-305,
Nehru Nagar No.2,
H.M. Road, Near Podu
Mariyamman Temple,
Sion Koliwada, (Ori. Acc. No.4)
Mumbai 400 037 ...Appellant

Versus

The State of Maharashtra ...Respondent

.....

Shri. P. Janardhanan, counsel with Shri. Prakash Naik, Advocate for the appellant (accused No.4).

.....

ALONGWITH

CRIMINAL APPEAL NO. 487 OF 1999

1. Sanmogan @ Kutti Wilwadia Dewar,
R/o. Hut No. 48/F/N,
Salamati Hill,
Sardar Nagar No.4,
M.A. Road, Sion, Koliwada,
Mumbai 400 022. (Ori. Acc. No.1)

2. Appau Kuttirmogam Devendra,
R/o. Nehru Nagar,
Zopadi-B, Behind Bldg. No.7,
R. No.422, Sion Koliwada, (Ori. Acc. No.5)
Mumbai 400 022 ...Appellants

Versus

The State of Maharashtra ...Respondent

....

Shri. Ganesh Gole with Shri. Prakash Shetty,

Advocate for appellants (accused Nos. 1 and 5)

.....

ALONGWITH

CRIMINAL APPLN. NO. 1813 OF 2003
AND
CRIMINAL APPEAL NO.352 of 2000

Lingam @ Linga Alumalai Naikar,
Prisoner No. C-10857, (Ori. Acc. No.2)
Yerwada Central Prison ...Appellant
Pune.

Versus

The State of Maharashtra ...Respondent

.....

Shri. Shekhar A. Ingawale, Adv. for the appellant.

.....

ALONGWITH

CRIMINAL APPEAL NO. 632 OF 2000

Joy George Fernandes,
Prisoner No. C/10858,
Yerwada Central Prison, (Ori. Acc. No.3)
Pune. ...Appellant

Versus

The State of Maharashtra ...Respondent

.....

Mr. Shekhar A. Ingawale, Advocate for the appellant (accused No.3.)

Mrs. U.V. Kejriwal, A.P.P. for the State in all appeals.

.....

CORAM: H.L. GOKHALE AND
SMT. V.K. TAHILRAMANI, JJ.

DATE : 11TH AUGUST, 2004

ORAL JUDGMENT (PER V.K. TAHILRAMANI, J.):-

1. Through these appeals, the appellants challenge the judgment and order dated 9.8.1999 passed by the learned Additional Sessions Judge, Greater Bombay in Sessions Case Nos. 934 of 1996 and 1243 of 1997. By the said judgment and order, the learned Sessions Judge convicted and sentenced the appellants to undergo R.I. for 10 years and to pay fine of Rs.1,000/- i/d R.I. for one year for the offence U/sec. 449 r.w. 34 of I.P.C.. By the said judgment and order, the learned Sessions Judge also convicted and sentenced the appellants to undergo R.I. for life and to pay fine of Rs.2,000/- i/d R.I. for two years for the offence U/sec. 302 r.w. 34 of I.P.C.

2. Criminal Appeal No. 487 of 1999 has been preferred by original accused No. 1 Sanmogan @ Kutti Wilwadia Dewar and original accused No.5 Appau Kuttirmogam Devendra. Criminal appeal No. 352 of 2000 has been preferred by original accused No.2 Lingam @ Linga Alumalai Naikar. Criminal appeal No. 632 of 2000 has been preferred by original accused No.3 Joy George Fernandes and criminal appeal No. 444 of 1999 has been preferred by original accused No.4 Suppu @ Sippu Kandaswamy Devendra. Original accused No.1 Sanmogan Dewar,

original accused No.2 Lingam Naikar, original accused No.3 Joy George and original accused No.4 Suppu Devendra were facing trial in Sessions Case No. 934 of 1996. Original accused No. 5 Appau Kuttirmogam Devendra came to be arrested later on i.e. on 24.6.1997, hence he was charge sheeted and the case was committed to the Court of Sessions and numbered as Sessions Case No. 1243 of 1997. As all the accused were involved in the same offence and the facts relating to both the Sessions cases were same, both the cases were tried together and disposed of by a common judgment and order dated 9.8.1999.

3. As all the appellants are involved in the same offence and are convicted by the impugned judgment and order dated 9.8.1999 of the learned Sessions Judge, we are disposing of these four appeals by this common judgment. For the sake of convenience, all the accused shall be referred to by the original accused numbers as given by the learned Sessions Judge i.e. appellant Sanmogan @ Kutti Wilwadia Dewar shall be referred to as accused No.1, appellant Lingam @ Linga Alumalai Naikar shall be referred to as accused No.2, appellant Joy George Fernandes shall be referred to as accused No.3, appellant Suppu @ Sippu Kandaswamy Devendra shall be referred to as accused No.4 and appellant Appau Kuttirmogam Devendra shall be referred to as

accused No.5.

4. The prosecution case briefly stated is as under:-

. That the complainant Sushila Tangvelu Devendra (P.W.3) was residing alongwith her husband Tangvelu Devendra (deceased) in hut No.222, Nehru Nagar No.1 Zopadpatti, behind Municipal Building E/3, Makkawadi, Mumbai-37. She was residing with her two daughters Rajeshwari @ Raji (P.W.2) and Sumati and two sons Murugesh (P.W.4) and Ganesh. The complainant Sushila was residing there since her marriage. At the time of the incident, her daughter Sumati was studying in standard 1st, son Murugesh in standard 2nd and another son Ganesh in standard 6th in Sanatan Dharma School.

. It is the case of the prosecution that the complainant was knowing all the five accused. On the date of the incident i.e. on 12.1.1996 at about 10.30 p.m. all the accused persons alongwith others in furtherance of their common intention committed house trespass by entering into hut No. 222 in which the complainant was residing with her husband and children. Thereafter, deceased Tangvelu was dragged out and assaulted by all the accused with deadly weapons like chopper, gupti, knife and sword. Thereafter the complainant was

taken to the hospital alongwith her husband. Her husband was declared dead on admission. In the hospital, the statement of the complainant came to be recorded which is treated as F.I.R. (Exh. 17). After registration of F.I.R. investigation was conducted in the usual manner. Accused No.1 Sanmogam, accused No. 2 Lingam, accused No.3 Joy and accused No.4 Suppu @ Sippu came to be arrested on 15.1.1996. After completion of investigation, charge-sheet came to be filed against all the four accused. In the said charge-sheet accused No.5 was shown as absconding. In due course the case was committed to the Court of Sessions and it was numbered as Sessions Case No. 934 of 1996. Lateron, accused No.5 came to be arrested on 24.6.1997 and his case was committed to the Court of Sessions and it was numbered as Sessions Case No.1243 of 1997. As all the accused were involved in the same offence, both the Sessions Cases came to be tried together.

5. Charge was framed against all the accused persons U/sec. 449 r.w. 34 of I.P.C. and 302 r.w. 34 of I.P.C. In addition to this, accused No.4 was also charged for the offence U/sec. 324 of I.P.C. for causing injury to P.W.3 Sushila by knife. All the accused pleaded not guilty to the said charges and claimed to be tried. Their defence is that of denial.

6. During the trial, the prosecution examined in all 16 witnesses. Out of the said 16 witnesses, three witnesses are eye witnesses i.e. P.W.2 Rajeshwari, daughter of the deceased, P.W.3 Sushila, the wife of deceased and P.W.4 Murugesh. Relying upon the evidence of P.W.3 Sushila and P.W.4 Murugesh, the learned Sessions Judge convicted and sentenced all the appellants as stated in para 1 above. The learned Sessions Judge acquitted the accused No.4 Suppu @ Sippu Kandaswamy Devendra for the offence U/sec. 324 of I.P.C. for causing injury to P.W.3 Sushila. Being aggrieved by the conviction and sentence as imposed by the learned Sessions Judge, these four appeals have been preferred by the original accused Nos.1 to 5.

7. We have heard Mr.Janardhanan, learned counsel for the appellant (original accused No.4) in Criminal appeal No. 444 of 1999, Mr. Ganesh Gole, advocate for the appellants (original accused Nos. 1 and 5) in criminal appeal No. 487 of 1999 and Mr. S.A. Ingawale, advocate for the appellants (original accused Nos. 2 and 3) in criminal appeal 352 of 2000 and 632 of 2000 respectively. We have also heard Mrs. U.V. Kejriwal, the learned A.P.P. for the State in all four appeals. After utmost circumspection, we have reached the conclusion that all the four appeals deserve to be allowed.

8. The conviction of the appellants is founded on the evidence of two eye witnesses i.e. P.W. 3 Sushila and P.W.4 Murugesh. It may be stated here that P.W.2 Rajeshwari, the daughter of the deceased has also been examined as an eye witness, however, she has turned hostile, hence, the conviction is based only on the ocular account of P.W.3 Sushila and P.W.4 Murugesh. The prosecution has also relied on the evidence relating to recovery of weapons at the instance of the accused. However, none of the panch witnesses have supported the prosecution on this aspect. Moreover, the weapons have not been shown to any of the witnesses in the present case. None of the eye witnesses have identified any of the weapons seized as those which had been used in the commission of the offence. In such case, in our opinion, the learned Sessions Judge was right in discarding the evidence relating to recovery of weapons at the instance of the appellants. For the reasons, referred hereinafter in our view, neither the ocular evidence of P.W.3 Sushila nor P.W.4 Murugesh can be said to be beyond reproach.

9. We would first like to take up the ocular account rendered by P.W.3 Sushila. P.W.3 Sushila has stated that on the date of the incident i. e. on 12.1.1996 at about 10.30 p.m., she was in her

hut alongwith her children and her husband. At that time, accused No.5 called her husband. When her husband went to the door, accused No.5 pulled him by holding his neck. Outside accused Nos. 1, 2, 3 and 4 were standing with accused No.5. Alongwith them there were 20 to 30 other persons near the door. Sushila has stated that when they were about to shut the door, the persons forcibly entered in the hut by pushing the door. Firstly, her husband was assaulted with chopper. Her husband fell down outside the house. She slept over the body of her husband to protect him but she was pulled by the accused persons and her husband was assaulted on his stomach. His intestine came out. Thereafter, P.W.3 Sushila has stated that accused Nos. 1 to 5 had assaulted her husband with knife. However, this statement is an omission and hence, it cannot be taken into consideration.

10. On behalf of the appellants it is submitted that there was no opportunity to Sushila to have seen the incident, as there was no light. This has been admitted by Sushila in her evidence. Sushila has specifically admitted that there was no light in her area at the time of incident. Thus, it was submitted that it was not possible for Sushila to see the assailants who were involved in the incident which occurred outside her house.

11. It is further submitted that the incident had occurred at about 10.30 p.m. and the FIR of Sushila has been shown to be recorded at about 1.30 a.m. On behalf of the appellants, it has been submitted that the said FIR is a false & concocted statement and the accused have been falsely implicated therein. It is submitted that Sushila is not an eye witness but she must have implicated the appellants due to the fact that there was rivalry in relation to Devendra Sangam Samaj between her husband i.e. the deceased and the appellants and thus she has falsely implicated the appellants. It is submitted that after the incident, Sushila was taken to the hospital alongwith her husband. Sushila has stated that when she was taken to the hospital, she was unconscious, later on she came to know that her husband was dead. She regained consciousness on the next day after she was operated and thereafter, her statement came to be recorded in the hospital. On the basis of the specific evidence of this witness, it is submitted that the F.I.R. of Sushila could not have been recorded two hours after the incident as she was unconscious at that time. On perusal of evidence of Sushila, it is noticed that she has indeed stated when she was admitted in the hospital, she was unconscious and thereafter she was operated. After she was operated, she regained consciousness and after that

her statement came to be recorded. Thus, there is some merit in the submission made on behalf of the appellants.

12. Thereafter, it was submitted that in her examination in chief Sushila has stated that all the accused assaulted her husband with knife. However, in her cross examination, Sushila has admitted that the said statement does not appear in her statement i.e. F.I.R. On going through the evidence, we find that Sushila has admitted that it did not happen that accused No.4 Suppu assaulted her on her both hands by knife. Sushila has further stated that it did not happen that she told the names of 5/6 people who entered her house with weapons and dragged her husband Tanguvel out. It did not happen that her husband was lying in front of her door on the back on the 'Nala'. It also did not happen that 2-3 persons separated her from her husband when she was lying over his body and 3 persons caught held and that 2 persons gave blows on her husband's stomach. She told police all the names of the assailants, however, the names do not appear, in her statement. She did not tell police that Suppu assaulted her on both her hands with knife. She did not tell police that 5-6 persons entered her house with weapons and dragged her husband Tanguvel out of the house. She did not tell police that 2-3 persons pulled her and

separated her from her husband. She did not tell police that 2 persons gave blows on the stomach of her husband.

13. From the evidence of P.W.1 Laxman Anant Sawant, constable, attached to Antop Hill police station, it has come on record that there was criminal record against the deceased at Antop Hill police station. Thus, it was submitted that there were inimical terms between the deceased and someone else who assaulted the deceased and caused his death. The learned counsel for the appellants submitted that as there were strained relations between Devendra i.e. husband of Sushila and the appellants on account of Devendra Sangam Samaj, Sushila has falsely implicated the appellants.

14. Moreover, as far as Sushila is concerned, she has specifically admitted that before she stepped in the witness box she was read over and explained her statement which she was supposed to give before the Court. Sushila has stated that earlier also statement was explained to her as also when she stepped in the witness box, her statement was explained to her. Sushila has also deposed that she knew that the accused persons would be brought to the court. On the basis of this submission made by Sushila in her evidence, it has been contended on behalf of the appellants that Sushila was a

tutored witness and hence no reliance can be placed on her testimony. Not only this but on perusal of the evidence of Sushila we find that it is full of omissions and contradictions and hence, we do not find it safe to rely on the same.

15. The prosecution has also placed reliance on the evidence of P.W.4 Murugesh, son of the deceased. Murugesh was implicated only three accused persons. He has stated that the accused No.5 came to his house and called his father out. Accused No.1 gave blow with sword on his father's neck. Thereafter, his father was dragged out from the house. His mother fell on the body of his father to save his father. Thereafter, accused No. 2 Lingam gave knife blow on his father's stomach. Thereafter, accused No.4 Suppu dragged his mother away. First of all, it is pertinent to note that he has identified Joy George Fernandes (accused No.3) in the present case as Lingam who gave knife blows on the stomach of his father. Thus as far as accused No.2 Lingam is concerned, it is clearly a case of wrong identification. As far as the other accused are concerned, P.W.4 Murugesh, in his cross examination, has stated that he told the police that Appau called his father out and Katti also came with sword and he knew him since the beginning and his father asked his mother to shut the door, but accused No.1 gave blow with the sword on his

father's head. Thereafter, his father was dragged out by them and when he was running he fell down because of entangling of foot in the pipe. He also told police that his mother went forward to save his father and she also fell on the stomach of his father to save him and thereafter Lingam gave knife's blow on his father's stomach. However, admittedly all these above averments do not appear in his statement before the police. He could not assign any reason for the omission. He also stated that Suppu and Chotya dragged his mother away, however, this averment also does not appear in his statement before police.

16. Thus, from the entire evidence of this witness, we find that there are a large number of inconsistencies, omissions and contradictions in his evidence. There are also a large number of contradictions between the evidence of the two eye witnesses interse. In this view of the matter, we do not find it safe to rely on the evidence of P.W.3 Sushila and P.W.4 Murugesh. There is no other material on record which connects any of the appellants with the offence. For the said reasons, we are of the opinion that this is a fit case wherein the appellants should be extended benefit of doubt.

17. In the result, we allow all the four appeals. We set aside the conviction and sentence of all the appellants for the offence U/sec. 449 r.w. 34 of

I.P.C. and for the offence U/sec. 302 r.w. 34 of I.P.C. and acquit them therein. The fine amount, if any, paid by any of the appellant be refunded. Accused No.1 Sanmogan @ Kutti Wilwadia Dewar, accused No.2 Lingam @ Linga Alumalai Naikar, accused No.3 Joy George Fernandes and accused No.5 Appau Kuttirmogam Devendra, are in jail, they shall be released forthwith unless wanted in some other case. Accused No.4 Suppu @ Sipu Kandaswamy Devendra is on bail. His bail bond stands cancelled.

18. Appeals are allowed accordingly.